Vet. App. No. 15-3844

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

WILLIAM EVANS,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-3844
	)	
ROBERT A. McDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUES PRESENTED

I. Whether the United States Court of Appeals for Veterans Claims ("Court") should affirm the Board of Veterans' Appeals' ("Board") denial of entitlement to service connection for cardiac disease, including coronary artery disease, carotid artery stenosis and coronary bypass surgery, to include as a result of exposure to Agent Orange.

II. Whether the Court should affirm the Board's denial of entitlement to service connection for a skin disorder of the bilateral feet, including psoriasis, dyshidrosis, and dermatitis, to include as a result of exposure to Agent Orange.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the Board under 38 U.S.C. § 7252(a). However, because the Board's remand of the claim of entitlement to service connection for urethral stricture "does not make a final determination with respect to the benefits sought by the [V]eteran," the Board's remand on this issue "does not represent a final decision over which this Court has jurisdiction." *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

B. NATURE OF THE CASE

On August 7, 2015, the Board issued a decision denying entitlement to (1) service connection for cardiac disease, including coronary artery disease, carotid artery stenosis and coronary bypass surgery, to include as a result of exposure to Agent Orange; (2) service connection for a skin disorder of the bilateral feet, including psoriasis, dyshidrosis, and dermatitis, to include as a result of exposure to Agent Orange; and (3) service connection for right shoulder disability, to include arthritis. The Board also remanded the claim of service connection for urethral stricture. Mr. William Evans (hereinafter "Appellant") filed a timely appeal of the Board's decision on October 8, 2015.

Appellant does not challenge the Board's denial of service connection for a right shoulder disability; therefore, the Court should consider that issue abandoned. *See Pederson v. McDonald,* 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its

authority to address an issue not raised by an appellant in his or her opening brief."); *Cacciola v. Gibson*, 27 Vet.App. 45, 47 (2014) (holding that when an appellant expressly abandons an appealed issue or declines to present arguments as to that issue, the appellant relinquishes the right to judicial review of that issue and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

C. STATEMENT OF RELEVANT FACTS

Appellant served on active duty in the U.S. Air Force from March 1963 to February 1986. (Record ("R.") at 109, 236, 251, 255). During this service, he was stationed at U-Tapao Air Force Base in Thailand as an administrative specialist from August 31, 1967, to December 12, 1967. (R. at 247, 250). Appellant's performance review for the period from July 1967 to May 1968 describes his duties as performing various administrative tasks in the Civil Engineering Orderly Room. (R. at 226 (225-26)). Service treatment records from 1968 document chest pain, as well as an echocardiogram showing marked right axis deviation that was probably congenital, and a diagnosis of costochondritis. (R. at 680-84). In April 1972, Appellant was diagnosed with "cellulitis, left foot, organism undetermined." (R. at 808). At his October 1985 separation examination, no rash or foot disabilities were noted, and Appellant denied any cardiac symptoms. (R. at 777-82).

Post-service private treatment records from March 2003 show a history of

right internal carotid artery stenosis twelve years earlier, with a resultant endarterectomy. (R. at 590). An October 2003 magnetic resonance imaging ("MRI") study documents recurrent carotid artery stenosis. (R. at 589). In October 2005, Appellant sought treatment for dermatitis on his right foot. (R. at 1098 (1098-99)). A November 2005 biopsy of the right foot showed psoriasiform dermatitis. (R. at 1091 (1089-95)). In August 2007, Appellant underwent coronary bypass surgery, (R. at 587), and a November 2008 treatment record indicates a history of coronary artery disease. (R. at 625). December 2008 dermatology records show diagnoses of dermatitis, psoriasis, and dyshidrosis, and note lesions on Appellant's palms and feet. (R. at 1120, 1122 (1120-22)).

In February 2009, Appellant filed claims of service connection for carotid artery, quadruple bypass surgery, and a rash on both feet, as well as several other disabilities unrelated to this appeal. (R. at 1507 (1502-14)). VA mailed Appellant a letter in March 2009, informing him that VA was working to develop his claims for service connection. (R. at 513-22). The letter discussed herbicide exposure and requested that Appellant send evidence of any service in Vietnam, or if he did not serve in Vietnam, an explanation of "when, where, and how" he was exposed to herbicides. (R. at 515 (513-22)). In response, Appellant submitted his DD-214 showing that he was awarded the Vietnam Campaign Medical, and a service treatment record showing his service in Thailand. (R. at 1493 (1487-93)).

In May 2009, a Joint Services Records Research Center ("JSRRC")

coordinator reviewed Appellant's service treatment records and personnel records, and found no evidence that Appellant served in-country in Vietnam. (R. at 577 (577-79)). The JSRRC coordinator's memorandum additionally quoted information from the "Herbicide Use in Thailand during the Vietnam Era" memorandum (hereinafter "Thailand Memorandum"), which was added to Appellant's claims file. *Id*.; *see* (R. at 541-43). The Thailand Memorandum indicates that tactical herbicides were used and stored in Thailand from April to September 1964 at Pranburi Military Reservation and not at any point thereafter. (R. at 541 (541-43)). It notes that non-tactical (commercial) herbicides were used sporadically within fenced perimeters and that security police units, or other military occupational specialties with regular contact with the base perimeter, had a greater likelihood of exposure to commercial pesticides, including herbicides. (R. at 542 (541-43)). Nevertheless, the Thailand Memorandum recommended that regional offices request information from JSRRC to corroborate a veteran's claim unless the claim is "inherently incredible, clearly lacks merit, or there is no reasonable possibility that further VA assistance would substantiate the claim." *Id*.

On October 15, 2009, another JSRRC coordinator completed a memorandum, constituting a formal finding that there was "no evidence available to corroborate the veteran's claim of exposure to Agent Orange," based upon a review of all of Appellant's records. (R. at 539). The memorandum indicated that all efforts to obtain the needed military information had been exhausted, and

further attempts would be futile. *Id*. As a result, on October 22, 2009, the Denver Regional Office ("RO") denied Appellant's claims of service connection for a rash on both feet, carotid artery stenosis, and coronary artery bypass graft. (R. at 524-38). Appellant filed a notice of disagreement in July 2010, in which he stated, "[e]ven though VA has been unable to establish that I was in Vietnam, I know that I was there, as well as Thailand." (R. at 502-03). In March 2011, VA sent Appellant a letter identifying him as a potential *Nehmer* class member, and providing him an opportunity to submit evidence showing he served in the Republic of Vietnam. (R. at 480-81). In response, Appellant filed a statement that "he was stationed in Thailand and flew back and forth to Vietnam." (R. at 478).

Subsequently, VA obtained a medical opinion with regard to Appellant's cardiac claims in December 2011, in which the examiner opined that Appellant's chest pains in service were non-cardiac, and Appellant's vascular lesions (to include carotid and coronary artery disease) were not related to his chest pain in service. (R. at 473 (471-74)). After a Statement of the Case was issued, (R. at 439-67), Appellant perfected his appeal in January 2012. (R. at 437-38).

On August 7, 2015, the Board issued the decision now on appeal, denying service connection for cardiac disease and skin disorder of the bilateral feet. (R. at 1-19). The Board concluded that Appellant did not have service in Vietnam and had not alleged any other exposure or that he worked near the base perimeter in Thailand. (R. at 8-9 (1-19)). Thus, the Board determined Appellant

was not subject to any presumptions of service connection based on Agent Orange exposure. *Id*. It found that although Appellant had a current diagnosis of cardiac disease, service connection was not warranted because cardiac disease was not shown within a year of separation, nor was there evidence of a nexus to service. (R. at 9-11 (1-19)). With regard to Appellant's skin disorder of the bilateral feet, the Board concluded that there was no competent evidence linking his skin disorder to service. (R. at 12 (1-19)). This appeal followed.

SUMMARY OF THE ARGUMENT

The Court should affirm the August 2015 Board decision because Appellant has not demonstrated any prejudicial error. First, VA adequately developed Appellant's claim of Agent Orange exposure, obtaining his personnel records, service treatment records, military reports, and a formal finding from the JSRRC. Likewise, the Board adequately discussed that the claim was appropriately developed.

Second, the Board properly found, in accordance with its role as factfinder, that the evidence in the record indicating a lack of service in Vietnam or other herbicide exposure outweighed Appellant's vague lay statements. This conclusion is plausible, supported by the record, and well within the Board's authority to weigh the credibility and probative value of evidence.

Finally, the Board did not commit prejudicial error in finding VA was not required to afford Appellant an examination for his foot disability. Even when considering an isolated treatment record showing Appellant had cellulitis on his

foot during service, the record does not contain any indication that Appellant's current skin disorder is related to service. Therefore, the Board's ultimate conclusion that a medical examination was not necessary is not arbitrary and capricious.

ARGUMENT

A. VA fulfilled its duty to assist by appropriately developing Appellant's claim of Agent Orange exposure.

It is well settled that the Secretary has an affirmative duty to assist the veteran in developing evidence to substantiate a claim. *Douglas v. Shinseki*, 23 Vet.App. 19, 22 (2009). The Board's determination of whether VA has satisfied its duty to assist is a finding of fact the Court reviews under the "clearly erroneous" standard of review. *See Nolen v. Gober*, 14 Vet.App. 183, 184 (2000). In this case, Appellant alleges that VA failed to appropriately develop his claim of Agent Orange exposure. Appellant's Brief ("App. Br.") at 8-11. Appellant was stationed at U-Tapao Base in Thailand as an administrative specialist in 1967, during the Vietnam era, and has stated that he "was in Vietnam" and "flew back and forth" to Vietnam. (R. at 250, 478, 502 (502-03)).

The aerial spraying of tactical herbicides, such as Agent Orange, was widespread in Vietnam as a means to destroy enemy food crops, reveal enemy jungle positions, and provide defoliated security zones around U.S. military bases. In recognition of this use, Congress passed the Agent Orange Act of 1991, which established a statutory presumption of herbicide exposure for any

Veteran with service in the Republic of Vietnam between January 9, 1962, and May 7, 1975. *See* 38 U.S.C. § 1116; *see also* 38 C.F.R. §§ 3.307, 3.309. "Service in the Republic of Vietnam" requires actual presence within the land borders of Vietnam. *See Haas v. Peake*, 525 F.3d 1168, 1172 (Fed. Cir. 2008). In addition to herbicide use within the Republic of Vietnam, Department of Defense ("DoD") documents also show that Agent Orange was used temporarily along the Korean demilitarized zone ("DMZ") during the Vietnam era. This led VA to establish a regulatory presumption of exposure for veterans who served in certain military units operating on the DMZ between April 1, 1968 and August 31, 1971. *See* 38 C.F.R. § 3.307(a)(6)(iv).

However, there is no similar legal or evidentiary basis for recognizing presumptive Agent Orange exposure based on service in Thailand. According to a DoD report describing defense security measures on all U.S. Air Force bases in Thailand prior to 1973, herbicide was used in Thailand within fenced-in perimeters for vegetation control. *Project CHECO Southeast Asia Report, Base Defense in Thailand 1968-1972* 58 (hereinafter "CHECO Report"), *available at* http://www.afhra.af.mil/shared/media/document/AFD-080819-065.pdf. However, some perimeters were not appropriate for herbicide use because of civilian populations, and the evidence indicates herbicide use on perimeters was incomplete and inconsistent. CHECO Report at 74-75. Recognizing this potential of herbicide exposure and viewing evidence in a light most favorable to veterans who may have been exposed to herbicide in Thailand, VA determined

that a special consideration on a factual basis should be extended to veterans whose duties placed them on or near the perimeters of Thailand military bases. *M21-1 Adjudication Procedures Manual*, Part IV, Subpart ii, Chapter 1, Section H.5.a.

The VA Adjudication Manual directs that if a veteran served at a U.S. Air Force base in Thailand (including U-Tapao) during the Vietnam era as a security policeman, security patrol dog handler, member of the security police squadron, or "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence," herbicide exposure should be conceded. *M21-1 Adjudication Procedures Manual*, Part IV, Subpart ii, Chapter 1, Section H.5.b. If not, the manual directs that VA should "[a]sk the Veteran for the approximate dates, location, and nature of the alleged exposure." *Id*.

Despite Appellant's arguments to the contrary, App. Br. at 8-11, VA undertook all appropriate development to help Appellant corroborate his claim of Agent Orange exposure, including compliance with the VA manual, and the Board discussed how all appropriate development had been completed. (R. at 5 (1-19)). The RO sent Appellant two letters alerting him of the opportunity to submit evidence of herbicide exposure, (R. at 513-22, 480-81), obtained a Memorandum for the Record regarding herbicide use in Thailand during the Vietnam era (Thailand Memorandum), (R. at 541-43), and obtained a formal finding from the JSRRC that all efforts to corroborate Appellant's claim of

herbicide exposure had been exhausted. (R. at 539).

The first letter, sent in March 2009, stated,

> We need to know how your military duties exposed you to herbicides. There are two possibilities: you served in the Republic of Vietnam during the Vietnam Era . . . [or] your job in service (other than in Vietnam) exposed you to herbicides. . . . If you did not serve in Vietnam, we need to know when, where, and how you were exposed.

(R. at 515 (513-22)). Appellant was also mailed a letter in March 2011, which identified him as a potential *Nehmer* class member and notified him that he could submit evidence showing service in the Republic of Vietnam. (R. at 480 (480-81)); *see Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846 (9th Cir. 2007). These letters clearly satisfied VA's duty to assist, as well as the VA Adjudication Manual's directive to "[a]sk the Veteran for the approximate dates, location, and nature of the alleged exposure." *M21-1 Adjudication Procedures Manual*, Part IV, Subpart ii, Chapter 1, Section H.5.b. In spite of this notice of an opportunity to do so, the Veteran did not supply any specific information regarding his exposure to Agent Orange during service or request that VA obtain any reasonably identifiable records to support his claim. *Jones v. Shinseki*, 23 Vet.App. 382, 391 (2010) ("Notwithstanding the duty to assist, it remains the claimant's responsibility to submit evidence to support his claim."); *see* 38 U.S.C. § 5107(a); *Loving v. Nicholson*, 19 Vet.App. 96, 102 (2005) (noting that 38 U.S.C. § 5103A requires a claimant to "adequately identify" relevant records). Therefore, the Court should find that the RO fully satisfied the duty to notify.

VA also adequately developed Appellant's claim with regard to obtaining any relevant military records that could corroborate Appellant's allegations of Agent Orange exposure. The Thailand Memorandum drafted by Compensation and Pension Service indicates that tactical herbicides were only used and stored in Thailand from April to September 1964, prior to Appellant's service and at a separate base. (R. at 541 (541-43)). Nevertheless, the Thailand Memorandum recommended that regional offices request information from JSRRC to corroborate a veteran's claim unless the claim is "inherently incredible, clearly lacks merit, or there is no reasonable possibility that further VA assistance would substantiate the claim." *Id*. Subsequently, in October 2009, the JSRRC coordinator made a formal finding that there was "no evidence available to corroborate [Appellant's] claim of exposure to Agent Orange," and that all efforts to obtain the needed military records had been exhausted. (R. at 539). Contrary to Appellant's assertions, App. Br. at 10, this finding did recognize Appellant's alleged service in the Republic of Vietnam, as well as his conceded service in Thailand. *Id*. ("Review of the personnel records show the veteran served in Thailand from August 31, 1967 through December 11, 1967 at U-Tapao Air Field as an Admin Specialist."). VA also obtained Appellant's full personnel file, including service personnel records from during the Vietnam era. *See* (R. at 117).

In concluding that the duty to assist had been met, the Board discussed these efforts to corroborate Appellant's claim, noting that personnel records were

obtained and a formal finding was made by JSRRC. (R. at 5 (1-19)). Because Appellant has not identified any failure of VA to obtain reasonably identified relevant records or to comply with any other required development, the Court should affirm the Board's finding that the duty to assist in developing Appellant's claim of herbicide exposure was met. *See Nolen*, 14 Vet.App. at 184.

B. The Board did not err by finding Appellant's statements that he served in Vietnam were not credible.

Although Appellant argues that the Board did not provide an adequate statement of reasons and bases for rejecting his lay statements regarding herbicide exposure, App. Br. at 5-8, it is clear by the Board's analysis that it found Appellant's statements not to be credible. The Board stated that Appellant's statements were "directly contradicted by the evidence of record, and of no probative value." (R. at 9 (1-19)); *see e.g. Bardwell v. Shinseki*, 24 Vet.App. 36, 40 (2010) (concluding that the Board did not err by rejecting appellant's assertion of in-service chemical exposure "on the basis that such exposure is not documented in his personnel records").

The record contains ample evidence that indicates Appellant did not serve in Vietnam and was not exposed to herbicides during his Thailand service. Appellant's full personnel records are contained within the claims file, and they make no reference to any service or travel to or within the Republic of Vietnam, or to any activities that would expose Appellant to herbicides during his service in Thailand. *See* (R. at 117) (requesting that Appellant's "entire personnel file" from

NPRC be furnished); (R. at 250) (detailing Appellant's chronological listing of service, which does not include Vietnam). For example, Appellant's personnel records show that he was stationed at U-Tapao Base in Thailand from August to December 1967. (R. at 250). A performance report from July 1967 to May 1968 describes the nature of Appellant's military occupational specialty ("MOS") as an administrative specialist during this service, and does not indicate any regular contact with the base perimeter. (R. at 226 (225-26)). Rather, the report describes a variety of administrative tasks, which appear to have been confined to the Civil Engineering Orderly Room. *Id*.

Additionally, the Thailand Memorandum states that tactical herbicides were only tested on a limited basis in Thailand from April to September 1964 at the Pranburi Military Reservation, prior to Appellant's service and at a separate location. (R. at 541 (541-43)). The Memorandum goes on to state that tactical herbicides and the aircraft that sprayed tactical herbicides were used and stored in Vietnam, not Thailand. *Id*. It also references aircraft that flew insecticide missions in Thailand from August to September 1963 and October 1966; again, these dates are prior to Appellant's service in Thailand. (R. at 542 (541-43)). The Thailand Memorandum does recognize the potential that veterans in Thailand may have been exposed to non-tactical (commercial) herbicides within fence perimeters, particularly if they regularly had contact with the base perimeter, such as security police units. *Id*. Yet, as stated above, Appellant's personnel and service records are complete and do not indicate any travel to

Vietnam, any regular contact with the base perimeter in Thailand, or any other exposure to herbicides. Likewise, JSRRC made two findings that Appellant did not have service within the Republic of Vietnam, and a formal finding that despite review of personnel and service treatment records showing Thailand service, there was no evidence available to corroborate Agent Orange exposure. (R. at 539, 577 (577-79)).

In contrast to these records that give detailed information about the use of herbicides in Thailand and Appellant's service duties during the Vietnam era, Appellant provided no details at all in his lay statements, such as dates, specific locations, or even the manner in which he was allegedly exposed to herbicides. *See* (R. at 478) (cursory statement that "Veteran . . . was stationed in Thailand and flew back and forth to Vietnam."); (R. at 502 (502-03)) ("Even though VA has been unable to establish that I was in Vietnam, I know that I was there, as well as Thailand."). Appellant has not even stated with any specificity whether he set foot in Vietnam or merely flew in Vietnam airspace, which would not qualify as "service in Vietnam." *Haas*, 525 F.3d at 1174; VA OPGCPREC 7-93 (August 12, 1993) (finding that service in high altitude planes flying over Vietnam without any other contact with Vietnam did not constitute "service in Vietnam" under 38 C.F.R. § 3.313).

Based on the record, the Board had a plausible basis to conclude Appellant's lay statements alleging herbicide exposure were not credible. (R. at 9 (1-19)). Importantly, the recognition that veterans who served in Thailand may

have been exposed to Agent Orange does not equate to a statutory presumption that Appellant was exposed to herbicides simply based on his service in Thailand, contrary to Appellant's suggestion. App. Br. at 8; *Haas*, 525 F.3d at 1185. ("The fact that Congress presumed [herbicide] exposure for veterans who served in Vietnam does not by any means suggest that exposure was considered unimportant and that veterans in other areas therefore do not have to prove exposure.").

Rather, the Board appropriately looked to the evidence, including Appellant's personnel and service records, his lay statements, and the information in the record based on JSRRC review and DoD information, and concluded that his lay statements were not probative. Contrary to Appellant's assertion, this was not an improper consideration of the absence of evidence. App. Br. at 12. This Court has held that the Board is not prevented from considering the probative value of silence in the available evidence if a proper foundation exists to demonstrate that such silence may prove or disprove a relevant fact. *See Buczynski v. Shinseki*, 24 Vet.App. 221, 226-227 (2011); *see also Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (holding that the Board can "weigh the absence of contemporaneous medical evidence against the lay evidence of record"). Moreover, although Appellant takes issue with the Board's finding that his lay statements were directly contradicted by the record, his allegations, *see* App. Br. at 6-7, are rooted in a misstatement or misunderstanding of the evidence. As stated above, the Thailand Memorandum

indicates that Appellant's service did not coincide with the time or location of spraying, Appellant's MOS does not support regular contact with the base perimeter, and the JSRRC on two occasions found that there is no evidence that Appellant was ever in Vietnam, (R. at 539, 577 (577-79)), and that there is no evidence to corroborate Appellant's claim of exposure to Agent Orange. (R. at 539).

The Board's conclusion that specific evidence, in the form of military reports and service personnel records, indicating a lack of exposure to herbicides was more probative than Appellant's vague allegations of herbicide exposure is certainly reasonable. The Board's analysis was an appropriate exercise of its authority to analyze the probative value of evidence and account for the evidence it found persuasive or unpersuasive. *See Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) ("[I]t is the Board's responsibility to determine the appropriate weight" to be given to evidence.); *D'Aries v. Peake*, 22 Vet.App. 97, 108 (2008) ("[I]t is the Board, not the Court, that is responsible for assessing the credibility and weight to be given to evidence.").

C. The Board's conclusion that a medical opinion was not necessary to adjudicate Appellant's claim of service connection for a skin disorder of the feet is plausible, despite its harmless oversight of a service treatment record.

VA's duty to assist includes providing a medical examination when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred

in service; and (3) an indication that the disability or persistent symptoms of disability may be associated with the Veteran's service; but (4) insufficient competent medical evidence for VA to make a decision on the claim. *See McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006). The Court has held that the third element, whether the evidence "indicates" that a disability "may be associated" with service, is a "low threshold." *Id*. at 83. The Board's "ultimate conclusion that a medical examination is not necessary pursuant to section 5103A(d)(2) is reviewed under the 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' standard of review." *Id*. at 81; *see* 38 U.S.C. § 7161(a)(3)(A).

As discussed *supra*, there is no evidence that Appellant was exposed to herbicides. Therefore, he is not entitled to a presumption of service connection for a skin rash. 38 C.F.R. § 3.307. It also follows that Appellant is not entitled to a medical opinion on the theory of service connection secondary to Agent Orange exposure, since there is no indication Appellant was ever exposed to Agent Orange as discussed previously.

Appellant therefore focuses his argument on direct service connection based on an in-service injury or disease. App. Br. at 11-14. In contrast to the Board's findings that there was "no medical evidence of record indicating any skin disorder of the bilateral feet until October 2005," and that Appellant's service treatment records did not contain complaints, treatment, or diagnoses regarding rashes or skin disorders on the feet, Appellant points to a singular service

medical record (among hundreds of pages of service treatment records) diagnosing cellulitis of the left foot. App. Br. at 12; (R. at 11-12 (1-19), 808). Although it appears that the Board did overlook this isolated incident of cellulitis, which the Secretary concedes could constitute evidence establishing an in-service injury or disease, Appellant points to no evidence showing any indication that his current foot disability may be associated with his documented cellulitis while in service. As such, the Board's error is harmless. *See* 38 U.S.C. § 7261(b)(2) (providing that the Court is required to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the burden of establishing whether an error is harmful falls on the party attacking the agency's determination); *Mayfield v. Nicholson*, 19 Vet.App. 103, 116 (2005), (finding that "a demonstration by one party that an error did not affect the outcome of a case would establish that there was or could be no prejudice"), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

Importantly, the Board correctly noted, "[t]here is no competent evidence linking [the Veteran's skin] disability to his service or any incident therein." (R. at 12 (1-19)). Appellant argues that "evidence of a skin disorder of the left foot during service combined with evidence of *similar* skin disorders of both feet after service may be sufficient to meet the low threshold of step three in *McLendon*." App. Br. at 13 (emphasis added). However, there is no evidence in the record indicating that cellulitis is similar to Appellant's current diagnoses of dermatitis psoriasiform or dyshidrosis, (R. at 1091 (1089-95), 1120-22), and Appellant has

not proffered any such evidence. Rather, cellulitis is a bacterial infection[1], whereas psoriasis[2] and dyshidrosis[3] are not believed to be bacterial.

Moreover, Appellant did not seek treatment for a foot rash until October 2005, more than 30 years after the isolated in-service cellulitis in 1972, and he has not alleged any continuity of foot rash symptoms since. (R. at 808, 1098 (1098-99)); *see Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) ("[E]vidence of a prolonged period without medical complaint can be considered" as a factor in deciding a claim.) Notably, the treatment in 2005 was for lesions on the right foot, whereas Appellant's cellulitis in service was on the left foot. (R. at 808, 1092, 1095 (1089-95), 1098 (1098-99)). Thus, although the third prong of *McLendon* is a low threshold, it is still a requirement that Appellant must satisfy before a medical examination is warranted. There is no indication in the record

[1] Cellulitis is a "common, potentially serious bacterial skin infection" that "appears as a swollen, red area of skin." *Diseases and Conditions: Cellulitis*, Mayo Clinic (Feb. 11, 2015), http://www.mayoclinic.org/diseases-conditions/cellulitis/basics/definition/con-20023471.

[2] Psoriasis is a "common multifactorial inherited condition characterized by the eruption of circumscribed, discrete and confluent, reddish, silvery-scaled maculopapules." *Stedman's Medical Dictionary* 735520 (2014); *see also Diseases and Conditions: Psoriasis*, Mayo Clinic (June 17, 2015), http://www.mayoclinic.org/diseases-conditions/psoriasis/basics/causes/con-20030838 ("The cause of psoriasis isn't fully known, but it's thought to be related to an immune system problem with cells in your body.")

[3] Dyshidrosis is a "vesicular or vesicopustular eruption, of unknown cause, chiefly involving the volar surfaces of the hands and feet; self-limited but may be recurrent." *Stedman's* at 272650.

that a singular incidence of a bacterial foot rash on one foot could be related to a different type of foot rash on the other foot over 30 years later.

Because the Board's finding that the third prong of *McLendon* is not met is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the Board did not err in finding a medical examination was not warranted. As such, the Board's oversight of the service treatment record diagnosing cellulitis on Appellant's right foot is harmless. The Court should affirm the Board's decision, because remand to rectify harmless error serves no useful purpose. *See Shinseki*, 556 U.S. at 409; *Valiao v. Principi*, 17 Vet.App. 229, 232 (2003); ("Where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision, the case should not be remanded for development that could not possibly change the outcome of the decision." (citing 38 U.S.C. § 7261(b)(2))); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (declining to remand where remand "would result in this Court's unnecessarily imposing additional burdens on the [Board and VA] with no benefit flowing to the veteran").

CONCLUSION

In light of the foregoing, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, asks the Court to affirm the August 7, 2015, Board decision.

Respectfully submitted,

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